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August 30, 2002

By ECFS and Electronic Mail

Jane E. Mago
General Counsel
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

*Re: Applications of Qwest Communications International, Inc. for Authorization
Under Section 271 of the Communications Act (WC Dkt. Nos. 02-148 and 02-189)*

Dear Ms. Mago:

On August 28, 2002, I wrote you a letter objecting to the *ex parte* process imposed by the Wireline Competition Bureau ("Bureau") on my client, Touch America, in the above-referenced Application matters.¹ In particular, I described how Touch America was required to invite Qwest Communications International, Inc. ("Qwest") to its *ex parte* meetings because the Commission is apparently of the belief that the issues raised by Touch America in these proceedings are the same issues raised in its Formal Complaints against Qwest.² Indeed, Qwest is not only permitted to attend and monitor such meetings but it is given equal time to present its adversarial case to the Commission. The process also applies to all of the issues raised by Touch America in the Application proceedings, irrespective of whether they were raised by the Formal Complaints. As stated in that portion of my letter describing the July 24th *ex parte* meeting of

¹ Although the letter referenced WC Docket No. 02-148, Touch America assumes that the *ex parte* process applies to both proceedings.

² Formal Complaint, *Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-003 (February 8, 2002) and Formal Complaint, *Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-004 (February 11, 2002), revised and refiled on March 1, 2002.

Touch America in WC Docket No. 02-148:

The effect of the Bureau's position was not only to subject issues that are also before the Commission in the formal complaint proceedings to its *ad hoc* rulemaking but to subject other issues to it as well. For instance, [at its July 24th meeting with the Bureau] Touch America addressed its position in this proceeding that Qwest failed to meet key performance measures and that future enforcement (*i.e.*, continued monitoring) of Qwest is not sufficient to support approval of Qwest's Application. These issues bear no relation to the facts and circumstances of the formal complaints, yet Touch America was required to present these issues in Qwest's presence and Qwest was permitted an opportunity to respond.

I showed in my letter how the Bureau's position prejudices Touch America, how it is contrary to the public interest because it denies a full and frank discussion of the issues and how it conflicts with Commission precedent as well as its rules and regulations. I concluded the letter by requesting a written response from your Office so that Touch America may consider any actions it needs to pursue in order to protect its interests in these matters. As of this date, which is only 13 days before the Commission is required to address the first Application, Touch America has not received your reply.³

In the meantime, it has come to the attention of Touch America that Qwest has continued its *ex parte* contacts in these matters but without the limitations imposed on Touch America. Specifically, Qwest met recently with the Commission "to discuss the company's ongoing review of accounting matters, its possible restatement of past financial statements arising from that review, and the company's actions in compliance with the relevant requirements set forth in Section [sic] 272 of the Communications Act . . ."⁴ Present at the meeting were no less than 11 members of the Commission, including 6 from the Bureau and 2 from the Enforcement Bureau who we understand have worked directly or indirectly on the Formal Complaints. Also present were 9 from Qwest, including its counsel of record for the Formal Complaint proceedings. Touch America, however, was not invited.⁵

³ Indeed, and as I noted in my August 28 letter, Touch America never even received a written reply to my June 28, 2002 letter which I sent to the Wireline Competition Bureau when Touch America first objected to the process.

⁴ Letter from Peter A. Rohrbach, Esq. to Ms. Marlene Dortch, Secretary, FCC Re: Applications of Qwest Communications International Inc. for Authorization Under Section 271 of the Communications Act WC Dockets No. 02-148 and 02-189 dated August 26, 2002 reporting about an *ex parte* meeting that took place four days earlier on August 22.

⁵ It cannot be said that the Commission discussed issues with Qwest that are not part of the Formal Complaint proceedings because as shown by my August 28 letter and as quoted above, the Bureau's position applies to other issues as well.



Not only has the Commission denied Touch America a full and frank discussion of the issues in these proceedings but it is clearly discriminating against Touch America and, in the process, providing Qwest with a prejudicial advantage. Qwest is allowed to discuss issues in these proceedings with the Commission on an *ex parte* basis, that is, to present such issues without the presence of Touch America but Touch America is unable to rebut the presentation of those issues by Qwest.

Although Touch America disagrees with the *ex parte* restrictions imposed on it, they must either be lifted or equally imposed on Qwest. Touch America has been prejudiced in these matters and continues to be prejudiced by the actions of the Commission. Once again, therefore, Touch America requests your reply.

Sincerely,

/s/
Daniel M. Waggoner

cc: Service List (Attached)

CERTIFICATE OF SERVICE

I, Jane L. Hall, do hereby certify that on this 30th day of August, 2002, a copy of the foregoing letter filed on behalf of Touch America, in Docket Numbers 02-148 and 02-189, was served by U.S. Mail, postage prepaid, to the parties on the attached service list.

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